

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

**UNITED TRANSPORTATION UNION -
ILLINOIS LEGISLATIVE BOARD**

vs.

KANSAS CITY SOUTHERN RAILROAD

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No. T04-0027

NOTICE OF FILING

TO:

Illinois Commerce Commission
ATTN: Judge Joseph O'Brien
By edocket

Mr. Paul Brown
Attorney for Kansas City
Southern Railroad
pbron@thompsoncoburn.com

Mr. Steve Matrisch
Attorney for Illinois
Commerce Commission
[SMATRISC@ICC.
STATE.IL.US.](mailto:SMATRISC@ICC.STATE.IL.US)

PLEASE TAKE NOTICE THAT on the 19th day of November, 2004, I filed the attached **CLOSING BRIEF OF THE UNITED TRANSPORTATION UNION.**

By: _____
Timothy C.Lapp, One of Its Attorneys

Timothy C. Lapp
HISKES, DILLNER, O'DONNELL,
MAROVICH & LAPP, LTD.
16231 Wausau Avenue
South Holland, IL 60473
(708) 333-1234
Atty. No. 80407

PROOF OF SERVICE

I, Timothy C. Lapp, an attorney, on oath state that I served this notice by e-mailing a copy to the above parties and their respective e-mail addresses on November 19, 2004.

Timothy C. Lapp

IN THE ILLINOIS COMMERCE COMMISSION
527 E. Capitol Avenue
Springfield, IL 62701

UNITED TRANSPORTATION UNION -)	
ILLINOIS LEGISLATIVE BOARD,)	
)	
against)	Case: T04-0027
)	
KANSAS CITY SOUTHERN RAILROAD)	

CLOSING BRIEF OF UNITED TRANSPORTATION UNION

NOW COMES the UNITED TRANSPORTATION UNION, by and through its attorneys, HISKES, DILLNER, O'DONNELL, MAROVICH & LAPP, LTD., and for its closing brief states as follows:

OVERVIEW

The Complaint which was filed by the United Transportation Union (UTU) against the Kansas City Southern Railroad (KCS) involves the shelter facility, or lack thereof, that the KCS provides for its train and engine employees (T&E) who are represented by the UTU. The facility in question is located in East St. Louis, Illinois. The facility at issue is a single-wide trailer which was set upon the site of a former constructed facility which was demolished by the KCS in October of 2003.

The hearing before the Illinois Commerce Commission (ICC) took place over two (2) days, July 28, 2004 and August 25, 2004. The hearing was conducted before the Honorable Joseph O'Brien, Administrative Law Judge for the ICC. There were a total of five (5) witnesses who gave testimony at the hearing, namely: Don Eddy (Eddy), John Burner (Burner), Bob

Waggoner (Waggoner), Joseph Szabo (Szabo) and Grey Haney (Haney). Eddy, Burner and Szabo testified on behalf of the UTU, Waggoner testified on behalf of the ICC as to inspections he made at the facility and Haney testified on behalf of the KCS. Both the UTU and the KCS were represented by counsel and the hearing was adversarial.

The two (2) days of the hearing were transcribed by court reporters. The transcript pages are consecutively numbered from 1 to 550. All cites to transcripts identify the speaker, page and line(s) numbers. For example: "Eddy Tr. P. 38, lines 12-22". There were also documents, drawings and photographs which were admitted as exhibits and where exhibits are referred to, they are identified pursuant to the exhibit number attached to them at the hearing. In this brief, the UTU has identified certain proven facts from the hearing. Although the UTU has attempted to identify all relevant proven facts, the entire 550 pages of testimony and rulings from the hearing obviously constitute the record along with the admitted exhibits.

FORMAL COMPLAINT

The Formal Complaint filed by the UTU alleged nine (9) areas in which the trailer provided by the KCS for T&E employees was deficient and in derogation of 92 Illinois Administrative Code, Part 1545 and the Washroom Act, 820 Illinois Compiled Statutes 230. Specifically, the Complaint alleges violations of the following regulations:

1. That in violation of 1545.110, the one (1) restroom provided in the trailer for employees did not have adequate ventilation or an adequate supply of toilet paper.
2. That in violation of 1545.120, the one (1) restroom provided in the trailer for employees did not have adequate sanitary conditions, did not have hot water, did not have paper towels, did not have waste receptacles, did not have soap provided and overall, did not have adequate supplies provided for the employees.
3. That in violation of 1545.130, the one (1) shower provided in the trailer for employees did not have an ample supply of hot water.

4. That in violation of 1545.140, the two (2) locker rooms provided in the trailer for the employees does not have required square footage per locker nor does it have adequate tables and benches for the employees to utilize in changing.
5. That in violation of 1545.160, the KCS did not make any accommodation for women employees who use the changing area.
6. That in violation of 1545.210, the lunchrooms provided by the KCS do not have adequate ventilation, waste receptacles, nor were they kept in an overall sanitary condition.
7. That in violation of 1545.230, the trailer used by the employees was not kept clean and sanitary.
8. That in violation of 820 ILCS 230, the KCS did not provide its employees a sanitary washroom for cleaning nor was suitable and ample hot water provided to employees for cleansing.
9. That in violation of the dictates of 1545, the trailer provided by the KCS for its employees is not an adequate facility as it does not function properly for its intended purpose.

Each allegation of the Complaint will be discussed below. As prayed for in the Complaint and as the facts adduced at the hearing support, the UTU asks that the ICC assess per diem fines against the KCS for those periods of time when the employees' facilities were either non-existent or maintained in derogation of 1545 regulations and the Washroom Act (820 ILCS 230). Additionally, the UTU has presented substantial evidence to the ICC that the trailer that has been provided for the employees by the KCS is an unacceptable excuse for a locker room and that the ICC should order that the KCS remove the trailer and construct a facility that is suitable for its intended purpose as a locker room and lunchroom facility. Plans should further be submitted in advance to the ICC for review and approval to insure their suitability for a functional facility.

**BASIS FOR IMPOSITION OF FINES ON A PER DIEM BASIS
BY THE ICC FOR EACH VIOLATION FOUND**

The Commercial Transportation Law (625 ILCS 5/18c-1101 et seq.) provides the ICC with enforcement authority over shelter facilities for railroad employees. At 625 ILCS 5/18c-1701 and 1704, the ICC is authorized to sanctions violations with civil penalties. 625 ILCS 5/18c-1704(2) authorizes civil penalties to be assessed against violations in an amount of not less than \$100.00 and not more than \$1,000.00 per violation. Further, 625 ILCS 5/18c-1701 provides that each provision that is violated constitutes a separate violation and each day of a violation constitutes a separate violation.

**BASIS AND SUPPORT FOR THE ICC TO ORDER THE
KCS TO CONSTRUCT A NEW SHELTER FACILITY FOR ITS EMPLOYEES**

Part 1545 of Title 92 of the Illinois Administrative Code provides rules for the type, location and to some degree size of facilities which rail carriers are required to provide for their employees. A reading of the regulations contained in 1545.10 through 1545.300 makes it obvious that these regulations are not meant to be all-encompassing but, instead, are meant to be read with an eye toward reasonableness and the application of common sense. Obviously, in 1545.110, the provision dealing with toilets, reasonableness and common sense must be read into the section so that it is clear that a toilet that has a three (3) inch circumference or a toilet stall manufactured out of see-thru plexiglass will not pass muster. Common sense must prevail. The ultimate goal is insuring the suitability and functionality of the facility for its intended purpose.

So it is that when the ICC decides a case, such as this one, common sense must be applied and must prevail. As far back as 1944, the ICC was hearing cases based upon complaints about locker rooms and other employee facilities. Brotherhood of Railroad Trainmen

vs. Chicago, Burlington & Quincy Railroad Company, Docket No. 31923 is one such case. In that case, complaints were raised by the employees as to a locker facility which was retrofitted from an old railway box car. The ICC in that case cast a serious eye on its duty to look after and protect workers at their place of work and decided that the box car should not be allowed to serve as a substitute for a locker room that was constructed to be a permanent building. In the words of the ICC in that case, the locker room that is provided must be adequate and suitable for the purpose intended. The ICC made clear that it was more than a matter of providing “space” for a shelter facility. Application of the code required suitability and functionality for the intended purpose. The ICC in the case cited ordered the railroad to remove the box car and to provide the amenities required in “a building adequate and suitable for the purposes intended”. In addition, the ICC in that case required the railroad to submit plans for the new building to the ICC for review and monitoring. To insure that the order would be carried out, the ICC retained jurisdiction. Quite simply, the ICC has enormous authority under Part 1545.

FROM APPROXIMATELY OCTOBER 15, 2003 TO NOVEMBER 16, 2003, UTU EMPLOYEES WERE PROVIDED WITH ABSOLUTELY NO SHELTER FACILITY.

The statements of fact for this section are as follows:

1. Old facility was shut down and demolished in the middle of October 2003. (Eddy Tr. P.17, lines 14-22; P. 18, lines 1-14)
2. Current locker facility was not placed on the site of the old facility until approximately one month after the old facility was demolished.(Eddy Tr. P. 18, lines 1-14)
3. Current trailer used as the locker facility was at the rail yard in the parking lot for approximately six months prior to the time the old facility was demolished. (Eddy Tr. P. 18, lines 15-22; P. 19, lines 1-12)
4. After complaints were made to management by the employees that there were no locker facilities after the demolition of the old facility, the current trailer was opened in the parking lot. The trailer had no water, no working washroom and the trailer was filthy.

(Eddy Tr. P. 19, lines 17-22; P. 20, lines 1-16).

5. On November 11, 2003, Bob Waggoner conducted an inspection of the trailer. At that time, the trailer was not open for use by the employees. (UTU Exhibit #6).
6. There was room at the rail yard to set up the trailer prior to demolition of the old facility if management would have desired to do so. (Eddy Tr. P. 164, lines 19-22; P. 165, lines 1-6).

There was not one piece of evidence or testimony offered by KCS to refute the testimony by the UTU that there was no shelter facility provided to the T&E employees during the time between the evacuation and tear down of the old facility and the moving of the trailer from the parking lot to the site of the old facility. The delay of thirty (30) days during which T&E employees had no facility cannot be mitigated away with excuses that there were delays in doing this or that by the KCS. There should have been a contingency plan and input by the UTU.

Allegations 1 through 8 of the Complaint have been proven for this period of time. The ICC should find that 1545.110, 1545.120, 1545.130, 1545.140, 1545.160, 1545.210, 1545.230 and 820 ILCS 230 was violated by the KCS for everyday for the thirty (30) day period there was no shelter facility. Accordingly, sanctions in the form of fines should be levied against the KCS for each violation for everyday the violation continued.

FROM NOVEMBER 22, 2003 THROUGH JANUARY 13, 2004,
THE CONDITION OF THE TRAILER SHOWED LITTLE IF ANY IMPROVEMENT.

The statement of facts for this section are as follows:

7. UTU Group Exhibit #1, pictures (A) and (B), show the washroom in the trailer as it existed on November 22, 2003. There was no running water, no working toilet, no working sink, no working shower. (Eddy Tr. P. 24, lines 7-21).
8. When the trailer was placed on the current site, it contained an old, unplugged refrigerator which was moldy inside and smelled horrible. (UTU Group Exhibit #1, pictures (C), (D), and ((L); Eddy Tr. P. 27, lines 15-22).

9. On November 22, 2003, nearly one month after the old facility had been demolished, the intended lunchroom in the trailer used by the T&E employees was filled with boxes and other debris and there was no furniture for dining. (Eddy Tr. P. 34, lines 12-22; P. 35, lines 1-8; UTU Group Exhibit #1, pictures (I) and (J)).
10. As of January 13, 2004, the toilet was not functional in the trailer. (Eddy Tr. P. 52, lines 19-20).
11. As of January 13, 2004, there were no paper products supplied for the washroom in the trailer. (Eddy Tr. P. 52, line 21; P. 53, lines 8-21).
12. January 13, 2004 was a little more than 60 days after the trailer was first put into use by the Respondent. (Eddy Tr. P. 54, lines 7-11).
13. From November 16, 2003, until January 13, 2004, there was no one cleaning the trailer. (Eddy Tr. P. 54, lines 17-18),
14. The shower room in the trailer was dirty the day the trailer was first put into use and has remained dirty to the present day. (Eddy Tr. P. 158, lines 7-17).
15. On January 13, 2004, there were no tables or chairs or any place for eating in the lunchroom of the T&E trailer. (Burner Tr. P. 183, lines 3-9).
16. On January 13, 2004, the toilet in the T&E trailer would not flush. (Burner Tr. P. 186, lines 5-13).
17. As of January 13, 2004, there was no ventilation system for the washroom/shower room in the T&E trailer. (Burner Tr. P. 186, lines 17-21).

For the period between November 22, 2003 and January 13, 2004, it is once again apparent that the KCS was not meeting its requirements under Part 1545 of the Code. This period covers approximately the first sixty (60) days that employees were allowed to utilize the trailer. During this period, the condition of the trailer was in derogation of the following regulations - 1545.110 (ventilation), 1545.120 (restroom - sanitary condition), 1545.210 (lunchroom - ventilation) and 1545.230 (overall sanitation).

The violations that existed regarding 1545.140 (square footage of locker rooms and furniture) and 1545.160 (accommodations for women) will be addressed in a separate section below.

Once again, the KCS offered no evidence to refute the evidence offered by the UTU. The violations of the four (4) Code sections existed during the period of November 22, 2003 to January 13, 2004. The ICC should levy a sanction against the KCS for each violation for each day those violations existed during this period.

**LUNCHROOM HAS NEVER HAD A VENTILATION SYSTEM AND
THE KCS HAS NO PLANS TO INSTALL ONE.**

The statement of facts for this section are as follows:

18. The KCS has no plans to install ventilation fans in the lunchrooms.
19. The ICC inspections have consistently cited the KCS for failure to equip the lunchroom(s) with a ventilation system. (UTU Exhibits #6, #9 and #14).
20. Bob Waggoner, the ICC inspector, enforces 1545.210 as requiring forced air exhaust fans in lunchrooms in order to provide adequate ventilation.

As is evident from the testimony of Greg Haney, the KCS has steadfastly refused to install ventilation systems in the lunchroom of the T&E trailer or any of the trailers it has offered as lunchrooms. During the hearing, there was convoluted testimony about opening windows and doors and setting the heating or air conditioning controls to allow for an internal fan to blow. This testimony was tortured at best. Once again, reasonableness and common sense must win out. 1545.210 is not a difficult section of the Code to comply with. The Code calls for adequate ventilation in lunchrooms. The trailers were designed to be construction offices, not lunchrooms. The ICC should find the KCS to be in violation of 1545.210 for each and every day that the

trailers have been utilized.

**THE KCS HAS STEADFASTLY REFUSED TO PROVIDE ADEQUATE
LOCKER AND SHOWER FACILITIES FOR ITS FEMALE EMPLOYEES.**

The statement of facts that apply to this section are as follows:

21. In October of 2003, there was one female working at the KCS facility (Eddy Tr. P. 104, lines 11-13).
22. On November 11, 2003, the KCS has no locker room or shower facilities for its female employees. (UTU Exhibit #6, bullet point 3).
23. On January 13, 2004, the KCS had no locker room or shower facilities for its female employees. (UTU Exhibit #9, bullet point 2; Burner Tr. P. 178, lines 3-22; P. 179, lines 1-22).
24. As of April 13, 2004, the KCS had provided a locker facility for the female employees in the superintendent's trailer. However, no shower facility had been provided for the female employees. (UTU Exhibit #14, bullet point 3).
25. If a female wished to shower, they would have to use the single shower in the men's T&E employees' trailer and then go back to the superintendent's trailer to dress. (Eddy Tr. P. 63, lines 17-22; P. 64, lines 1-22; P. 65, lines 11-22).
26. There are currently two (2) females working out of the KCS facility. (Eddy Tr. P. 104, lines 8-17).
27. If the two (2) females who are UTU members and who have lockers in the superintendent's double-wide trailer wanted to shower, they would have to walk through the conference room in the superintendent's trailer to get to the shower. (Eddy Tr. P. 168, lines 10-16).

As pointed out in an earlier section, the female employee who was at the KCS facility during the period that there was no facilities whatsoever suffered the same as the men during that time. She had absolutely no facilities during the thirty (30) day period from the closing down and demolition of the old facility until the trailer was opened for use sometime in mid-November, 2003. The plight of this female worker did not improve one iota. However, after the

trailer was made available for the T&E employees. She had no separate facility for changing and no separate facility for showering.

Sometime between January 13, 2004 and April 13, 2004, the female employees' situation did improve somewhat. During this period, a few lockers were provided for her use in the superintendent's trailer, the washroom off of the conference room to be specific. However, no shower room is provided in the superintendent's double-wide trailer. The only shower facility that is provided is the single shower in the men's T&E trailer. In other words, if a female wishes to shower, she must go outside from the superintendent's trailer and walk a short distance to the T&E trailer to use the shower and then must walk back to the superintendent's trailer where her locker is. Going outside in the winter time when you are wet may be part of the thrill of a Swedish spa experience, but it should not have to be part of taking a shower after a days' work.

Part 1545.160 requires that provision be made for the female employee for locker room purposes. From October, 2003 until sometime after January 13, 2004, no such provision was made. The KCS was in violation of 1545.160 for each day between the middle of October and sometime after January 13, 2004 when lockers were placed in the superintendent's trailer. A daily sanction should be imposed against the KCS for the ninety (90) days that no female facilities were provided.

In addition, the KCS should be ordered to plan comprehensively to insure that the needs of the female employees are met in a suitable and functional manner. Shower facilities must be in conjunction with lockers and the dressing room. The female employees should not be required to shower in one facility and dress in another. Once again, common sense and reasonableness should prevail.

**THIS IS THE TYPE OF CASE WHERE MONETARY SANCTIONS ARE
WARRANTED AGAINST THE KCS DUE TO ITS STEADFAST
REFUSAL TO REMEDY THE SHORTCOMINGS AT THE KCS FACILITY.**

The statement of facts that pertain to this section are as follows:

28. On November 10, 2003, Szabo prepared a letter to Mike Stead of the ICC stating that he had been told by UTU membership that there was no shelter facility for T&E employees at the KCS yard. (UTU Exhibit #3; Szabo Tr. P. 355, lines 12-22; P. 356, lines 1-14).
29. On November 13, 2003, Szabo wrote a letter to Taulton Dancy, the terminal superintendent for the KCS. In this letter Szabo outlined the problems with the lack of a shelter facility and asked Dancy what the KCS was doing about it. (UTU Exhibit #5; Szabo Tr. P. 362, lines 1-22; P. 363, lines 1-17).
30. Joe Szabo went to the KCS facility to do an inspection after being notified by one of the UTU officials who worked at KCS that the old facility had been demolished and no new facility had been provided. (Szabo Tr. P. 354, lines 17-22; P. 355, lines 1-11).
31. Prior to coming down to the KCS facility on December 5, 2003, Szabo called Dancy to request that Dancy meet with him to discuss the condition of the KCS facility. When Szabo was at the KCS facility on December 5, 2003, Dancy was too busy to meet with him. (Szabo Tr. P. 364, lines 15-22; P. 365, lines 1-19).
32. At the completion of Szabo's inspection of the T&E trailer on December 5, 2003, Szabo spoke with Greg Haney from KCS. Szabo stated his concerns with the T&E trailer to Haney. After hearing Szabo's concerns, Haney's reaction was indifference, what the UTU had was what the UTU was going to get. (Szabo Tr. P. 367 lines 17-22; P. 368, lines 1-16).
33. Szabo never received a response from Dancy or anyone else at the KCS to his November 13, 2003 letter. (Szabo Tr. P. 362, lines 13-15).
34. Following Szabo's inspection of the T&E trailer on December 5, 2003, Szabo again sent a letter to Taulton Dancy of the KCS (Szabo Tr. P. 368, lines 21-22; P. 369, line 1-22; P. 370, lines 1-9).
35. Szabo's correspondence of November 13, 2003 (UTU Exhibit #5) and December 15, 2003 (UTU Exhibit #7) were sent to Taulton Dancy because that is how communication on such issues had always been undertaken. (Szabo Tr. P. 371, lines 6-17).
36. Szabo's correspondence to Taulton Dancy on November 13, 2003 (UTU Exhibit #5) and December 5, 2003 (Exhibit #7) also asked that Dancy include the UTU in any plans that KCS had for correction of the problems at the T&E facility. Dancy and the KCS never

communicated with the UTU about any such plans. (Szabo Tr. P. 371, lines 18-22; P. 372, lines 1-10).

37. On January 13, 2004, John Burner handed UTU Exhibits #5 and #7 to Taulton Dancy, the terminal superintendent for Respondent. (Burner Tr. P. 178, lines 3-22; P. 179, lines 1-22).
38. On January 13, 2004, John Burner spoke to Taulton Dancy, the terminal superintendent for Respondent and told him that the locker rooms were not suitable and also that the facility was dirty. (Burner Tr. P. 183, lines 3-20).
39. On January 13, 2004, John Burner hand-delivered additional copies of Szabo's letters (UTU Exhibits #5 and #7) to Taulton Dancy. Even after this delivery of the letters, Szabo was never contacted by Taulton Dancy. (Szabo Tr. P. 373, lines 3-20).
40. On January 28, 2004, Szabo sent a third letter to Taulton Dancy and included, once again, copies of the two previous letters (UTU Exhibits #5 and #7). In this letter, Szabo states to Dancy that it has been way too long to wait for action from KCS and that a formal complaint to the ICC would follow unless corrective action was taken by the KCS. (UTU Exhibit #10; Szabo Tr. P. 376, lines 7-22; P. 378, lines 1-4).
41. As of July 28, 2004, the UTU has not received any input from the Respondent as far as how they and the UTU could work towards rectifying the situation with the T&E trailer. (Burner Tr. P. 219, lines 21-22; P. 220, lines 1-6).

The items enumerated in the statement of facts above show a clear pattern of the KCS ignoring the pleas of Joseph Szabo to bring themselves within the standards and dictates of Part 1545 and common decency. Mr. Szabo was not spicing his pleas with threats of job actions or any other language which could be considered a threat. Instead, Mr. Szabo was attempting to nip any problems in the bud. Each of Mr. Szabo's letters to Mr. Dancy requested that the facility be brought up to Code and that he was willing to meet and discuss what needed to be done and how it could be accomplished.

Not included in the statement of facts for this section but certainly relevant to this discussion is the fact that Bob Waggoner traveled out to the KCS facility on no less than three

(3) occasions to inspect the facility and each time sent inspection reports to the KCS, inspection reports that continuously showed deficiencies with the UTU trailer (see UTU Exhibits #6, #9 and #14).

The Court should recall that Greg Haney, as a continuing theme in his testimony, repeatedly referred to difficulties in scheduling as the reason for this delay or that delay. Such a defense should not hold any water. The fact of the matter is that the KCS, through Mr. Szabo and Bob Waggoner of the ICC, were put on notice very early in the game that changes were necessary. The KCS simply chose to ignore all the pleas.

This is the type of case that cries out for the imposition of sanctions. Further, those sanctions should be sizable. It should also be no defense for the KCS to say that most everything was attended to before the hearing. If compliance before a hearing is allowed by the ICC to be a defense to sanctions, there will never be voluntary compliance before a formal complaint and hearing is convened. Surely, the ICC does not wish to foster that kind of compliance. If a carrier is cited for violations and those violations are not corrected in a timely manner, there must be sanctions.

**THE LOCKER ROOM IN THE UTU TRAILER HAS NEVER
SATISFIED THE SQUARE FOOTAGE REQUIREMENT OF 1545.140.**

The statement of facts that pertain to this section are as follows:

42. Waggoner has inspected approximately 25 shelter facilities during his time with the ICC. (Waggoner Tr. P. 244, lines 20-22; P. 245, lines 1-3).
43. Waggoner did a third inspection of the T&E trailer on April 13, 2004. (UTU Exhibit #14).
44. Waggoner believes that in interpreting the Code for shelter facilities common sense has to prevail. (Waggoner Tr. P. 278, lines 1-8).

45. There are presently 62 lockers in the T&E locker rooms. (Waggoner Tr. P. 284, lines 1-17).
46. There are 62 lockers in both locker rooms. There are 18 lockers in the smaller locker room and 44 lockers in the larger locker room. (Respondent's Exhibit #7).
47. Based upon Waggoner's interpretation of 1545.140, the minimum required square footage needed to support 62 lockers in 2 locker rooms is 328 square feet. (Code section 1545.140).
48. The square footage of the 2 locker rooms, as measured by Respondent is 301 square feet. (Respondent's Exhibit #7, measurements appearing on said Exhibit).
49. Waggoner, in his capacity as an inspector for the ICC, considers the locker room in the T&E trailer as 2 locker rooms, not a single locker room. (Waggoner Tr. P. 289, lines 5-6).
50. Waggoner considers the T&E locker rooms as 2 separate rooms because there is a divider between the 2 rooms. The 2 rooms are not one wide open room. (Waggoner Tr. P. 290, lines 16-22; P. 291, lines 1-9).
51. Waggoner has always been consistent in his inspections as far as when a room is one room or when a room is two rooms. (Waggoner Tr. P. 290, lines 16-22; P. 291, lines 1-9).
52. Waggoner has never figured the square footage requirement for the UTU locker rooms based upon those two rooms being one room. (Waggoner Tr. P. 291, lines 10-16).
53. Waggoner's interpretation of Code section 1545.140 is that the square footage measurements should use as a basis the number of lockers which are in the facility, not the number of "assigned" lockers. (Waggoner Tr. P. 3-18).
54. Waggoner's interpretation of 1545.140 is that the 3 lockers that hold supplies in the UTU lockers are also to be counted in determining the required square footage needed. (Waggoner Tr. P. 343, lines 13-22; P. 344, lines 1-6).
55. There are 62 T&E employees assigned to the KCS yard. Included in the number 62 are one employee on medical disability (J.H. Black), one employee temporarily in Vicksburg (L.Q. Bass) and two employees who are in training (A.B. Baugus and J.D. Meyer). (Haney Tr. P. 490-498).

The Court should recall that it is undisputed that the trailer in question has a total of 62 lockers which are located in two (2) sections of the trailer. The schematics admitted as UTU

Exhibit #17 and Respondent's Exhibit #7 depict the physical set up of the locker room. Both of these drawings show a small locker area at one end of the trailer and a larger locker area in the middle of the trailer. Bob Waggoner, of the ICC, has consistently interpreted 1545.140 as requiring the square footage measurement to be based upon the number of lockers physically located in a locker room. In addition, Bob Waggoner has always treated locker rooms as two (2) rooms where the locker areas are not part of one wide open room. The KCS argued at hearing that the two (2) rooms in the locker room should be considered as one (1) room because the door between the two (2) rooms has been removed. Additionally, KCS also presented testimony at the hearing by Greg Haney that his recollection was that there were approximately 35 employees that had been assigned lockers. Mr. Haney did not present any written documentation as to the number of assigned lockers.

A. TWO ROOMS VS. ONE ROOM

Resolution of this issue should not require the ICC to do any more than look at UTU Exhibit #17 and Respondent's Exhibit #7. Both schematics depict a trailer which has a partition separating a smaller locker room from a larger locker room. Originally, there was a door that you would open and walk through to get from one locker room to the other. (See UTU Group Exhibit #2, picture (B)). All parties agree that that door is no longer there. What is still there, however, is the wall between the two (2) locker rooms as depicted in UTU Group Exhibit #2, pictures (A), (B), (E); Respondent's Exhibit #1, #2 and #3.

The argument put forward by the KCS really borders on the absurd. Do two (2) rooms separated by a wall and a door instantly become one (1) room because you remove the door? That in plain and simple terms is the outcome that the KCS is pushing for. Floor to ceiling wall

but because the door is removed just disregard the wall. If the ICC for some reason buys the KCS argument in this case, what does it do next time when two (2) rooms are separated by a 3 foot long hallway – would those two (2) rooms be considered as one? The simple, reasonable common sense

answer to each of these rhetorical questions is that two (2) areas divided by a wall are two (2) rooms. The ICC should so find in this case.

**B. NUMBER OF LOCKERS PHYSICALLY IN A LOCKER ROOM VS.
NUMBER OF LOCKERS ASSIGNED TO EMPLOYEES**

The wording of 1545.140(a) contains the sentence “Employees, as used herein, refers to employees to whom lockers have been assigned. Based upon that wording, the KCS took the position at the hearing that since there were only 35 employees to whom lockers had been assigned, the square footage requirement of 1545.140 should be based upon 35 lockers instead of the 62 lockers in the trailer.

Bob Waggoner of the ICC testified that in doing locker room inspections, he has always interpreted the square footage requirement based upon the number of lockers actually physically present in the locker room. Accordingly, Waggoner used the number of 62 lockers when making his determination that there was not enough square footage in the trailer locker rooms for the number of lockers.

Once again, common sense should win out. The purpose of 1545.140 is to provide a standard for a minimum amount of space to be provided for locker rooms. It is probably safe to assume that Mr. Waggoner may never have had an argument about “assigned vs. physically present” before because no rail carrier has ever tried to eke out the minimum square footage

during his 3 years with the ICC. If the intent is to provide 62 lockers in a facility, it should be designed and laid out to meet the needs of 62 employees. As Mr. Szabo said during his testimony in this case, UTU believes that 62 lockers is the minimum that may meet the T&E employees' needs at this facility. To simply reduce the number of lockers in the facility, or to get overly technical with the "assigned vs. physically present" interpretation of the Code will mean that the UTU or some other Complainant will be coming before the ICC every time more employees are "assigned" lockers or every time the need for lockers grows beyond the number of lockers provided. It just doesn't make sense. If you have 62 lockers in the locker rooms, provide enough room for those lockers.

**THE TRAILER PROVIDED TO THE UTU TO BE UTILIZED AS A
LOCKER ROOM AND LUNCH ROOM IS NOT ADEQUATE
NOR IS IT SUITABLE FOR THE PURPOSE INTENDED.**

The statement of facts for this section are as follows:

56. The current configuration of the lockers in the locker rooms, moving from the right side of Respondent's Exhibit #7 to the left side, provides for the following distances between rows of lockers or rows of lockers and walls:
 - a. 40 inches
 - b. 40 inches
 - c. 36 inches
 - d. 41 inches
 - e. 42 inches

(Respondent's Exhibit #7; UTU Group Exhibit #1, pictures (E), (F), (G) and (K); UTU Group Exhibit #2, pictures (A), (C), (D), (E), (I), and (J)).
57. The furniture in the locker rooms consists of two benches. One bench in the small locker room and one bench in the larger locker room. (UTU Exhibit #17; UTU Group Exhibit #1, pictures (G) and (K)).
58. All of the windows in the center locker room and one of the doors to the outside are covered up by lockers. (UTU Exhibit #17; UTU Group Exhibit #1, picture (A)).

59. The single washroom and single shower room in the trailer have one common door to the main trailer area. If someone is using the washroom, the shower room is closed off to other employees. The same is true if someone is using the shower. (UTU Exhibit #17; UTU Group Exhibit #1, picture (A)).
60. There is a solid wall or partition which closes off the smaller locker room from the larger locker room. Passage from the smaller locker room to the larger locker room is presently made via a door opening. The door itself, has been removed. (UTU Exhibit #17).
61. There are currently 62 lockers in the two locker rooms. (UTU Exhibit #17; Respondent Exhibit #7).
62. The single-wide trailer used by the UTU employees measures 56 feet long by 11 feet wide. (UTU Exhibit #17).
63. The trailer used by the UTU employees is not connected to the ground by a foundation, instead the trailer is set on blocks and secured by straps. (Eddy Tr. P. 33, lines 17-22; P. 34, lines 1-10; UTU Group Exhibit #1, picture (H)).
64. When the washroom door is opened, the washroom door clears the nearest lockers by only six to eight inches. (Eddy Tr. P. 50, lines 14-22; P. 51, lines 1-2).
65. The current trailer used by the T&E employees has no microwave, coffee pot or vending machines, as traditional lunch rooms do. The demolished facility had each of these amenities. (Eddy Tr. P. 60, lines 6-17).
66. At the time the trailer was first moved to the site of the demolished facility, there were 76 to 80 lockers in trailers two locker rooms. Presently, there are 62 lockers in the two locker rooms and 3 of those lockers are used for storage of paper products and cleaning supplies. (Eddy Tr. P. 66, lines 11-22).
67. In the same general area as the trailer occupied by the T&E employees, there are two other trailers. One of the trailers is a double-wide which is occupied by the terminal superintendent and two other officials. The other single-wide trailer is occupied by the mechanical department and the mechanical department supervisor. (Eddy Tr. P. 67, lines 1-22).
68. Don Eddy does not believe that the trailer used as the locker room facility is adequate nor that it could ever be adequate for use as a locker room facility. (Eddy Tr. P. 70, lines 8-18).
69. The aisles between the lockers do not allow for two men to stand back to back without the men touching each other. (Eddy Tr. P. 166, lines 18-22; P. 167, lines 1-4).

70. The conference room in the superintendent's double-wide trailer is approximately twice as large as the two locker rooms in the T&E employees' trailer. (Eddy Tr. P. 167, lines 5-17).
71. John Burner has inspected 7 or 8 locker rooms while employed by the UTU. (Burner Tr. P. 175, lines 14-22).
72. John Burner does not believe that the T&E trailer is adequate for a locker room. (Burner Tr. P. 208, lines 11-22; P. 209, lines 1-22; P. 210, lines 1-6).
73. Joe Szabo believes that there is a total lack of functionality as to the T&E trailer. Further, that the trailer wasn't designed to be utilized as a locker room. (Szabo Tr. P. 365, lines 6-19).
74. Based upon Joe Szabo's 24+ inspections, he believes that the T&E trailer is not only an inadequate facility but also a dysfunctional facility that was not designed to be suitable for its intended purpose. (Szabo Tr. P. 387, lines 17-22; P. 388, lines 1-22; P. 389, lines 1-3).
75. Don Eddy's measurement from shoulder to shoulder is 28 inches. (Szabo Tr. P. 401, lines 10-15).
76. The lunch room in the T&E trailer has a door that separates the lunchroom from the locker room. Since the KCS brought in the small round table, the table pins the door of the lunchroom to the wall. The end result is that the door separating the lunchroom from the locker room must remain open and persons taking lunch in this room have a clear view into the locker room. (Szabo Tr. P. 401, lines 16-22; P. 402, lines 1-22; P. 403, lines 1-17).

Although addressed as the final section in this brief, this section is really a build-up from the sections which have preceded it. As portrayed at the hearing, the trailer provided by the KCS to the UTU represented employees is an abomination and the ICC should order the trailer to be removed and replaced with a building that is built to meet the requirements of a shelter facility.

Two (2) tiny locker rooms, a tiny washroom, a single shower, a cramped lunch room, aisles between lockers that are not much wider than a man's shoulders, these are the conditions present in the UTU trailer. The pictures submitted by Respondent at the hearing show a locker

room that is clean, but terribly cramped. The UTU representatives, the KCS representatives, the attorney for the ICC and Judge O'Brien have all had occasion to be in a locker room at one time or another and it is with confidence that it can be stated that any of those parties have ever been in a locker room where there was no room to sit down in front of the locker you are trying to use. People sit down in front of a locker on a bench that runs the length of the lockers, a bench that is attached to the floor and remove or put on clothes after some kind of activity. You do not expect to have to balance while removing your clothes or slipping back into clothes. Using a locker is not supposed to be a challenge. Furniture must suitably placed to insure its practical and convenient usage. Functionality is the ultimate goal.

The obvious argument made by the KCS is that the Code says nothing about how the locker room should be constructed and therefore, the gerrymandering that they have done to the rented construction trailer makes the grade. This may sound like a broken record, but common sense and reasonableness must be the touchstone for the ICC in interpreting the Code, with suitability and functionality the ultimate goal. Part 1545 is not a criminal code which must be dissected word by word in order to convict a criminal. Part 1545 is instead standards which must be interpreted and which must be read and interpreted with an eye toward doing what makes sense. When the ICC decided Brotherhood of Railroad Trainmen vs. Chicago, Burlington & Quincy Railroad, it was not looking at a specific regulation of the Code which stated that the facility had to be adequate and used for its intended purpose. Instead, the ICC was taking its authority to oversee shelter facilities service and was making a common sense decision that railroad box cars should not be used for employee shelter facilities. The whole package did not feel right for the ICC and it did not hesitate to order that the railroad get rid of the box car and

replace it with a suitably designed building and also oversee the plans for the new building.

In this case, the UTU would be the first to admit that the construction trailer they are forced to use is probably not the exact equivalent of a box car. However, both the box car and the construction trailer have a lot in common with the most important thing being that neither facility was designed to be used as a locker room. UTU takes no automatic exception to the utilization of a modular unit, per se, provided that the facility is properly designed and laid out to flow as a functional facility. The test is the suitability, functionality and insuring convenience to meet the needs of the employees who must utilize the facility.

This is a case that cries out for help from the ICC. The UTU and its employees have approached this problem from the point of trying to get the KCS to do the right thing. The KCS has decided to fight at every turn. It is time for the ICC to make the proper decision and to order the removal of the T&E trailer and the construction of a facility which is designed to be a locker room and lunch room. Design plans should be reviewed and approved by the ICC, and input sought from the facility users to insure that it is suitable for its intended purpose.

CONCLUSION

When this hearing was conducted before the ICC, the UTU made it clear that they would be asking the ICC to not only impose fines or sanctions, but also for removal of a facility. The arguments made above justify substantial sanctions being levied against the KCS. Furthermore, the facility that the UTU employees have been provided is not an adequate locker room, lunch room or washroom facility and never will be. It should be replaced sooner than later. Once

again, the arguments made above justify an order requiring the removal of the trailer and design of an adequate facility.

For all the foregoing reasons, the UTU and its represented employees request that the ICC issue its decision in favor of the UTU and against the KCS and that the KCS be ordered to pay substantial sanctions and also that the KCS be ordered to remove the T&E trailer and design and construct a new locker/lunch room facility.

Respectfully Submitted,

Timothy C. Lapp, One of the Attorneys for the
United Transportation Union

Timothy C. Lapp
HISKES, DILLNER, O'DONNELL,
MAROVICH & LAPP, LTD.
16231 Wausau Avenue
South Holland, IL 60473
(708) 333-1234
Atty. No. 80407

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